

Rule of Law as a Perimeter of Legitimacy for COVID-19 Responses

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What Has the Last Year Taught Us?

The COVID-19 pandemic has presented an extreme strain on legal systems worldwide, as they struggled to adapt existing legislative frameworks, administrative functions, and executive decision-making to the fast-changing and complex situation of the pandemic emergency. The measures adopted worldwide, including mandates in the form of lockdowns and restrictions on gatherings, closures of educational and business institutions, have been not only among the most restrictive limitations on the rights of the majority of global population but also long lasting, with uncertain ending.

The dangers of the use of powers during an emergency (far broader than only the use of *emergency* powers) have been exposed as the pandemic has proved a catalyst for further rule of law backsliding and democratic deconsolidation throughout the world. Echoing the concerns of [international organisations](#) and [NGOS](#), the [2020 V-Dem report](#) decried a worldwide trend towards democratic decline and increasing autocratisation. This trend is not regional, but instead shows a worldwide shift as extended emergency exposes the [fragility of democracies](#) in times of crisis.

Even against such stresses, the rule of law should [best inform responses to emergency](#), as much as it should guide the use of power in ordinary times. The principles which form the foundation of the rule of law – legality, legal certainty, accountability, access to justice and equality before the law – are no less relevant to responses to a situation of extreme uncertainty and risk and provide a perimeter of legitimacy of the restrictive measures taken in response to the emergency situation.

In this post, we examine these key principles of the rule of law highlighting both deeply worrying trends and the exposure of concerns, but also where compliance with the rule of law can both enhance and inform the most effective strategies of risk management and emergency response.

Legality

The legality principle requires that State action is carried out in accordance with transparent and democratically enacted laws, not mere discretion. It also requires that the process for enacting laws is transparent, democratic, and subject to scrutiny.

A great majority of legal acts adopted worldwide in response to the pandemic have been on the basis of executive measures. These have varied in form (e.g. orders, decrees, or regulations) and legal basis (e.g. based on powers under a constitutional

state of emergency, prerogative powers, or based on ordinary laws). In some more concerning cases, these government-made laws have raised questions as to their legality where they have rest on uncertain, or even have little or no, legal basis. This has concerning and tangible consequences, where there are legal penalties for non-compliance.

There is a challenge on both sides of the argument for where ordinary legislation has been used. The unsuitability of the use of some pre-existing ordinary legislation has been highlighted in (among others) [Cyprus](#), [India](#) and [Slovenia](#) which provided for arguably *too much* discretion for executive action. Significant deference to government action has also been given in the form of broad and open-ended provisions in COVID-19 legislation allowing the government to take significant action with limited scrutiny. In [Switzerland](#), the COVID-19 Act was ‘too vague for ordinary legislation’ and when considered as emergency legislation ‘creates a form of empowerment vis-à-vis the government that lacks a constitutional basis.’ Similar questions over the legality of measures arose in [Turkey](#), where restrictive measures were based on pre-existing ordinary laws and – despite representing severe restrictions on constitutionally-protected rights – were not provided for through parliamentary legislation regardless of the constitutional requirement to do so. This safeguard of restrictions on rights only where provided by law (and not secondary acts of government) can be an effective tool where used, but has also been [ignored](#) or [avoided](#) in other states.

In [Denmark](#), which has otherwise reported a good balance between the demands of necessity, precaution and rule of law values, the mandated cull of all mink following fears for viral transmission was ordered by government while knowing that there was no legal basis for such an order at the point it was made, causing there to be an issue of compensation for mink farmers. While provision was retrospectively made for this order, it nevertheless raises concerns as to executive decision-making with *awareness* of acting outside of the law. In [Indonesia](#), government regulation prohibiting speech against the government’s control of the pandemic was without legal basis, and arguably against the decision of the Constitutional Court that such a provision would be in violation of the right to free speech under the constitution. [South Korea](#) provides the prime example on legal reform following the 2015 MERS outbreak, now serving as the legal basis for a successful strategy in response to the COVID-19 pandemic.

Legal Certainty

The early stages of the pandemic were marked by extreme uncertainty, in its virality, transmission and the effectiveness of strategies and advice to mitigate both risk and exposure. As a component of the rule of law, legal certainty requires accessible, intelligible, clear, predictable and prospective laws, in so far as this is possible. More than a year after the [declaration of COVID-19 as a public health emergency](#) of international concern, while far more is known of the virus and effectiveness of measures to combat it, there are nevertheless increasing concerns over the possibility of mutations immune to vaccines or with higher transmissibility. In such a continued environment of uncertainty and in effort to avoid the pandemic becoming

endemic to the global population, legal certainty as to what the rules are, when they do and do not apply, and how they are to be interpreted by relevant authorities, is essential.

A concerning trend observable worldwide is the delay in the publication of measures which often have been introduced with [little](#) or [no notice](#), or even only published [after](#) they have come into force. In some cases, this seems to be an observed choice of executives rather than by necessity of circumstance: the [Russian](#) example of Federal action via ordinance (which does not require publication) rather than decree (which requires publication) caused an absence of both communication and awareness of rules. The suspension of international flights was made by press-release, but without any ordinance or regulation. Further tension is exposed where there is unclear division of legal responsibility and powers (e.g. [Iran](#), [Pakistan](#)), with conflicting mandates and unpublished decision-making. Where measures are further undermined by [miscommunication](#), and a [lack of coordinated strategy](#) underpinned by clear legal provisions, or where government orders are '[piecemeal and scattered](#)', this can have the further effect of diminishing the effectiveness of measures.

By contrast, New Zealand's (forthcoming) successful strategy of coherent and clear communication paired with early response, effective leadership and 'a good sprinkling of luck' provides guidance on effective governance.

Prevention of Misuse of Powers and Accountability

The rule of law requires that executive power is exercised in good faith, fairly and within the limits for which it was conferred. Limiting executive misuse of powers during an emergency is a particular challenge for courts and legislatures, but this is precisely where the rule of law operates as safeguard and should best inform responses to the emergency.

Across a majority of states globally, the executive has been the key driver of action taken in response to the pandemic. This is both unsurprising and can be justified on the basis of the need for urgency of action which may not be delivered nor guaranteed by the legislature in a timely manner. However, the function of legislatures – as with the role of the judiciary – is to provide scrutiny and oversight to the practice of governments particularly where they so severely, and over a long period, curtail the rights and liberties of citizens and residents across the world. A concern now solidified a year later is that this absence of legislature oversight appears to have continued.

States of emergency have typically been associated with the use of executive power with comparatively [restricted](#) or little provision for legislative and judicial oversight. For many states, the involvement of legislatures in both the scrutiny of government action, and in legislating in response to pandemic, remains at best '[modest](#)' and at worst in effect all but [suspended](#). There are, however, signs of good practice: for example, [Finland](#)'s standing practice requiring real-time constitutional and parliamentary scrutiny of government regulations as both constitutional requirements, and also mandated under the Emergency Powers Act.

The Constitutional Law Committee of the Parliament exercises continuous scrutiny over both the constitutionality and human rights compliance of legislative bills and government regulations. Further good practice can be identified in [Sweden](#), with the establishment of a Commission of Inquiry constituted of independent experts, reviewing actions taken across central, regional and local governmental levels; and with the further establishment of a cross-party parliamentary commission to review the actions of parliament during the pandemic.

Access to Justice

Access to justice requires that everyone be able to challenge governmental actions and decisions adverse to their rights or interests. Both judicial scrutiny of emergency legislation and of the use of powers by government, as well as challenges of the impact of laws and other measures on the rights of individuals are covered here. Courts have a vital function during and after the pandemic and the legal system should continue to provide fair, accessible and effective means of dispute resolution.

Courts have faced important challenges during the pandemic, with some courthouses and buildings closing fully, even though for limited periods, and others only dealing with urgent or priority cases. The extent to which judges have been able to operate in person and virtually during the pandemic has largely depended on the particular State's response to COVID-19 and on whether the legislative framework allowed remote hearings while ensuring fair trial standards. In [Bangladesh](#) for instance, all courts were initially shut down by the government, without further consultation; later e-courts were allowed to operate during the pandemic, which required amendments of existing laws, both substantive and procedural. Some of these amendments have been challenged before the Supreme Court as contrary to the rule of law.

COVID-19 has impacted the types and numbers of cases that could be challenged before Courts, for instance cases related to sanctions imposed on individuals for breach of emergency measures (e.g., [Cyprus](#), [France](#), [Thailand](#)), and offences such as domestic violence (e.g. [Turkey](#) and [Lebanon](#)) and corruption in the health sector (e.g. [Bangladesh](#) and [Bulgaria](#)), which have increased during the pandemic.

In relation to challenges to emergency legislation, Constitutional, Supreme and/or High Courts have a key role to play in scrutinizing such legislation. State practice in this regard varies across the spectrum of how active Courts have been in checking compliance of the new laws and their implementation with rule of law safeguards. In countries where courts were closed (e.g. [Bangladesh](#)), access to justice was denied in practice and the courts have only been able to perform their role after the restrictions were lifted. In other cases, for instance in [Canada](#), it has been commented that the judiciary has played 'a passive role' during the pandemic, showing significant deference to political judgement and medical expertise. There are several examples, however, where courts have critically scrutinized emergency legislation, for instance in relation to compliance with the transparency, publicity and proportionality requirements ([Slovenia](#)); the correct use of legislative authority ([Italy](#)) or the rationality of the laws ([South Africa](#)). The Federal Supreme Court of

[Brazil](#), in particular, has played a key role in assessing the constitutional legitimacy of COVID-19 measures and delivered important decisions, such as those restricting police raids in Rio de Janeiro's slums during the pandemic, supporting health policies concerning the pandemic as applied to [indigenous people](#), and guaranteeing the constitutional right to access to information, in relation to the publicization of COVID-19 governmental data.

Non-Discrimination, Equality before the Law and Compliance with Human Rights

The rule of law can only be fully realised in an environment that respects and protects human rights. The laws should refrain from discriminating against individuals or groups and should guarantee equal and effective protection against discrimination on any ground, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Related to this, equality before the law involves that all individuals are subject to the same laws, with no individual or group having special legal privileges.

Discriminatory application of the legislation and restrictive measures was reported against certain individuals or groups due to their (perceived) nationality or ethnic origin and the severity of the pandemic in a particular country. In [Colombia](#) and [Turkey](#), discrimination concerns were raised, and eventually addressed before courts (in Colombia), in relation to a government decree restricting the mobility of elder persons. [Indonesia's](#) approach of prioritising vaccination of young people over the elderly by reason of their contribution to the economy was also criticised for being discriminatory and contrary to the Constitution.

In the context of responses to public health emergencies, measures should strike the right balance between specific conflicting rights, such as the right to liberty, freedom of movement, freedom of assembly, the right to work, manifestation of religion, privacy, and the right to life and health. In finding such balance, government responses have been assessed against compliance with and respect of the general principles of necessity and proportionality. For instance, the [Belgian](#) judiciary rejected the general prohibition of all religious services for being a disproportionate restriction of the freedom of religion. In [Australia](#), the Victorian Ombudsman found that the implementation of the targeted lockdown was wholly disproportionate and prejudicial to public housing residents, and oblivious of health and wellbeing issues, as well as cultural and linguistic diversity. Independent reviews investigating the proportionality of emergency executive measures play a crucial role, but they must be appropriately safeguarded and resourced, and receive due level of consideration by governments. In [Sri Lanka](#), the policy of forced cremations of cadavers suspected of being infected with COVID-19 has had harsh and disproportionate impacts on civil liberties, affecting in particular the Muslim community. Moreover, the centralised and militarized COVID-19 response has created a risk of further alienating ethnic minorities and causing further divisions in the population. In relation to the introduction of contact tracing COVID-19 apps, the principle is particularly relevant in

relation to interferences with the right to privacy and the use of data beyond contact-tracing purposes, for instance in criminal investigations (see debate in [Singapore](#)).

The Rule of Law in Pandemic

The rule of law provides a perimeter of legitimacy of the restrictive measures taken in response to the pandemic. Adherence to the rule of law can strengthen public trust in institutions and consolidate the legitimacy of the measures, ultimately bolstering their effectiveness through increased compliance. Such adherence rests on a balance between accountable and rationalised executive decision-making, and the active scrutiny and review of the legislature and the judiciary.

However, instead, a false and damaging narrative has become viral: the necessity of taking action in response to the pandemic emergency legitimises *all* action undertaken by governments. ‘Emergency creep’ and executive overreach or aggrandizement have now entered the vernacular of discussions on the impact of the COVID-19 pandemic on governance worldwide, and this is an unwelcome legacy. Beyond the measures of mortality and infection rates, we must also look to the surviving systems which will bear the consequences of the forms of governance adopted during pandemic.

